Supreme Court, U.S.
FILED

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OFFICE OF THE CLERK

No. _____

IN THE
SUPREME COURT OF THE UNITED STATES

RAYMOND CHAPIN,
Petitioner,
vs.

MICHAEL MOORE, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS, AND ATTORNEY GENERAL, STATE OF FLORIDA,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEAL, ELEVENTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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73pp

QUESTION PRESENTED FOR REVIEW

Whether the equitable tolling doctrine applies to a dismissal, as untimely filed, of a 28 U.S.C. §2254 Petition because the untimely filing was due to the misapprehension of counsel in a case that became final before the passage of Section 28 U.S.C. §2244(d)(1)(a) and (d)(2).

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B. This Court has not decided whether the actions of counsel may constitute equitable tolling so as to excuse the untimely filing of a petition. This Court should decide this issue in light of the lack of any remedy for a Petitioner under such circumstances. 15

C. This Court should decide whether the actual innocence/fundamental miscarriage of justice exception applies to the operation of the time limitations in 28 U.S.C. 2244. 17

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CITATIONS OF OPINIONS AND ORDERS

The orders under review in this cause were not officially reported: Consequently, the orders are attached in the following appendices:

Appendix B - Order of Dismissal with Prejudice by United States District Court

Appendix C - Order Denying Certificate of Appealability by United States District Court

Appendix E - Order by Eleventh Circuit Court of Appeals Denying Certificate of Appealability

JURISDICTION

The United States Court of Appeals for the Eleventh Circuit denied Petitioner's Request for a Certificate of Appealability (COA) on September 18, 2001. The Court denied the COA to challenge the dismissal of Petitioner's Petition for a Writ of Habeas Corpus pursuant to 28 U.S.C. §2254. The Eleventh Circuit found that pursuant to Slack v. McDaniel, 529 U.S. 473, 478, 120 S. Ct. 1595, 1600-01, 146 L. Ed 2d 542 (2000) Petitioner failed to show that reasonable jurists would find debatable the procedural issue of the dismissal of the 28 U.S.C. §2254 Petition as untimely filed.

This Court has jurisdiction to review a decision of the United States Court of Appeal pursuant to 28

U.S.C. §1254.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Statutory Provisions

28 U.S.C. §2253

(a) In a habeas corpus proceeding or a proceeding under section 2255 before a district judge, the final order shall be subject to review, on appeal, by the court of appeals for the circuit in which the proceeding is held.

(b) There shall be no right of appeal from a final order in a proceeding to test the validity of a warrant to remove to another district or place for commitment or trial a person charged with a criminal offense against the United States, or to test the validity of such person's detention pending removal proceedings.

(c)(1) Unless a circuit justice or judge issues a certificate of appealability, an appeal may not be taken to the court of appeals from –

(A) the final order in a habeas corpus proceeding in which the detention complained of arises out of process issued by a State court; or

(B) the final order in a proceeding under section 2255.

(2) A certificate of appealability may issue under

paragraph (1) only if the applicant has made a substantial showing of the denial of a constitutional right.

(3) The certificate of appealability under paragraph (1) shall indicate which specific issue or issues satisfy the showing required by paragraph (2).

28 U.S.C. §2244(d)(1)

(d)(1) A 1-year period of limitation shall apply to an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court. The limitation period shall run from the latest of–

(A) the date on which the judgment became final by the conclusion of direct review or the expiration of the time for seeking such review;

(B) the date on which the impediment to filing an application created by State action in violation of the Constitution or laws of the United States is removed, if the applicant was prevented from filing by such State action;

(C) the date on which the constitutional right asserted was initially recognized by the Supreme Court, if the right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review; or

(D) the date on which the factual predicate of the claim or claims presented could have been discovered through the exercise of due diligence.

(2) The time during which a properly filed

application for Sate post-conviction or other collateral review with respect to the pertinent judgment or claim is pending shall not be counted toward any period of limitation under this subsection.

STATEMENT OF FACTS

On November 10, 1999, Petitioner filed a 28 U.S.C. §2254 Petition to challenge a 1994 state (Florida) conviction for first degree murder. The United States District Court issued a rule to show cause. The Attorney General of the State of Florida argued the petition was untimely filed. Petitioner's direct appeal was decided by the First District Court of Appeal on January 2, 1996. Chapin v. State, 666 So.2d 903 (Fla. 1st DCA 1996) Petitioner petitioned the Florida Supreme Court for review; the Supreme Court denied review on February 5, 1996. Chapin v. State, 669 So.2d 250 (Fla. 1996). On January 22, 1998, Petitioner timely filed a Motion for Post-Conviction Relief pursuant to Rule 3.850 Florida Rules of

Criminal Procedure. The Florida First District Court of Appeal affirmed the denial of the 3.850 Motion on April 22, 1999. Chapin v. State, 732 So.2d 1072 (Fla. 1st DCA 1999) In the proceedings before the United States District Court, Petitioner filed a response to the Attorney General's arguments. Petitioner argued the doctrine of equitable tolling should render the 28 U.S.C. §2254 petition timely filed. See Appendix A to this petition, pages 2-4.

The United States District Court dismissed the 28 U.S.C. §2254 Petition. See Appendix B to this petition. The District Court found that because Petitioner's case became final (February 5, 1996) before the passage of the Antiterrorism and Effective Death Penalty Act (AEDPA), Petitioner had until

April 23, 1997 to file the 28 U.S.C. §2254 Petition, less any time a state post-conviction proceeding was pending. As Petitioner filed the state post-conviction motion on January 22, 1998, the 28 U.S.C. §2254 petition was untimely. See Appendix B to this petition, pages 2-4. The United States District Court denied a Certificate of Appealability pursuant to Slack v. McDaniel, 529 U.S. 473, 484, 120 S. Ct. 1515, 146 L. Ed. 2d 542 (2000) See Appendix C to this petition, pages 2-3.

Petitioner then filed a Request for a Certificate of Appealability in the United States Court of Appeal for the Eleventh Circuit. See Appendix D to this petition. Petitioner argued that pursuant to Helton v. Singletary, 85 F. Supp. 2d 1323 (S.D. Fla. 1999),

reversed 259 F. 3d 1310 (11th Cir. 2001), the equitable tolling doctrine should apply to the dismissal of the 28 U.S.C. §2254 petition because Petitioner relied upon counsel (Petitioner was represented by counsel throughout the state and federal court post-conviction proceedings) to timely file the petition. Counsel's misapprehension of the applicable time provisions should constitute an example of equitable tolling. See Appendix D of this petition, pages 4-6.

Petitioner further argued that the one year time limitation under 28 U.S.C. §2244(d) was a statute of limitation, not a jurisdictional bar; the doctrine of equitable tolling applied to a dismissal under 28 U.S.C. §2244. See Appendix D, pages 4-5. Petitioner also argued that a claim of actual

innocence should also overcome the procedural bar in this case.

The United States Circuit Court of Appeals for the Eleventh Circuit denied the Request for a Certificate of Appealability. See Appendix E of this petition. The Eleventh Circuit stated that because Petitioner's petition is plainly barred by the one year statute of limitations set forth in 28 U.S.C. §2244(d)(1), Petitioner failed to satisfy the second prong of the Slack v. McDaniel, 523 U.S. 473, 478, 120 S. Ct. 1595, 1600-01, 146 L. Ed 2d 542 (2000) test for a Certificate of Appealability - reasonable jurists would find debatable the procedural issue in this cause.

REASONS TO GRANT THE WRIT OF CERTIORARI

A. This cause presents the issue of whether the doctrine of equitable tolling applies to a dismissal of a state habeas corpus petition pursuant to 28 U.S.C. §2244(d)(1) (in light of the passage of the AEDPA in 1996) - this Court has not yet decided this issue.

In Duncan v. Walker, 533 U.S. 167, 121 S. Ct. 2120, 150 L. Ed 2d 251 (2001), this Court construed the provisions of 28 U.S.C. §2444(d)(2) to determine whether the filing of a federal habeas petition tolled the limitation period under 28 U.S.C. §2444(d)(2). Justice Souter and Stevens in their concurring opinion noted that a claim of equitable tolling could

have presented a serious question in Duncan v. Walker, *supra*. Petitioner realizes that the Duncan v. Walker court did not address the issue of equitable tolling. However, the Circuit Courts of Appeals have applied this doctrine to 28 U.S.C. §2244. See e.g. Smaldone v. Senkowski, 2001 U.S. App. Lexis 24815, (2d Cir. November 16, 2001); Whitebird v. Snider, 2001 U.S. App. Lexis 23652, (10th Cir. November 1, 2001); Sanduik v. United States, 177 F. 3d 1269 (11th Cir. 1999); Miles v. Prunty, 187 F. 3d 1104 (9th Cir. 1999). Consequently, this Court should decide whether this doctrine now applies to 28 U.S.C. §2244 in light of the time limitations imposed by the adoption of the AEDPA in 1996.

This Court should consider whether the

doctrine of equitable tolling applies in light of the fundamental change (from no time limit to a one year time limit) imposed by the AEDPA as to the time periods to file a 28 U.S.C. §2254 petition. Since the enactment of the AEDPA in April 1996, all of the Circuit Courts of Appeals have wrestled with the meaning of the time periods in 28 U.S.C. §2244. This Court should consider whether the doctrine of equitable tolling should apply where the fundamental change in the law has created uncertainty as to the applicable time limits. This Court should consider whether the doctrine of equitable tolling should prevent the harsh remedy of dismissal due to the lack of controlling judicial precedent to guide the actions of petitioners and their

counsel.

B. This Court has not decided whether the actions of counsel may constitute equitable tolling so as to excuse the untimely filing of a petition. This Court should decide this issue in light of the lack of any remedy for a Petitioner under such circumstances.

In the proceedings below, Petitioner relied upon Helton v. Singletary, 85 F. Supp. 1323 (S.D. Fla. 1999). The United States District Court in Helton held that miscalculation of the time period (by counsel) to file a 28 U.S.C. §2254 constituted an extraordinary circumstance to justify equitable tolling. The Eleventh Circuit reversed this holding. Helton v. Singletary 259 F. 3d 1310 (11th Cir. 2001).

Other Circuit Courts of Appeal have also held that miscalculation of the time periods by counsel does not qualify as equitable tolling. See Kreutzer v. Bowersox, 231 F. 3d 460 (8th Cir. 2000); Harris v. Hutchinson, 209 F. 3d 325 (4th Cir. 2000); Taliani v. Chrans, 189 F. 3d 597 (7th Cir. 1999). However, these Courts have not considered the issue of whether a Petitioner will have no remedy at all if counsel miscalculates the time period. The provisions of the AEDPA itself prohibit a petitioner from raising a claim of ineffective assistance of post-conviction counsel. Consequently, an individual Petitioner may suffer from the miscalculations or misapprehensions of counsel without any recourse. Therefore, this Court should grant certiorari to consider this

question.

C. This Court should decide whether the actual innocence/fundamental miscarriage of justice exception applies to the operation of the time limitations in 28 U.S.C. §2244.

Petitioner raised below the actual innocence exception to the operation of the time limitations in 28 U.S.C. §2244. The United States District Court and the Eleventh Circuit Court of Appeals did not address this issue. The Eleventh Circuit in Helton v. Singletary noted that it had not yet decided whether there is an actual innocence exception to the AEDPA's one year statute of limitations. Several other courts have considered, without actually deciding or finding inapplicable on the facts of the

case, this issue. See Whitebird v. Snider, 2001 U.S. App. Lexis 23652, (10th Cir. November 1, 2001); Tinker v. Moore, 255 F. 3d 1331 (11th Cir. 2001); Lucidore v. New York State Div. Of Parole, 209 F. 3d 107 (2nd Cir. 2000). For the reasons discussed in these cases and Helton v. Singletary, this Court should grant the writ to address this issue.

CONCLUSION

This Court should issue the Writ of Certiorari to review the decision of the Eleventh Circuit Court of Appeals for the reasons stated above.

Respectfully submitted,

December 13, 2001

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No. _____

IN THE
SUPREME COURT OF THE UNITED STATES

RAYMOND CHAPIN,
Petitioner,
vs.

MICHAEL MOORE, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS, AND ATTORNEY GENERAL, STATE OF FLORIDA,
Respondents.

Appendix A

Petitioner's Reply to Respondent's Answer to Petition for a Writ of Habeas Corpus

UNITED STATES DISTRICT COURT,
MIDDLE DISTRICT OF FLORIDA,
JACKSONVILLE DIVISION

RAYMOND CHAPIN,
Petitioner,

vs. CASE NO. 99-1116-CIV-J-21B

MICHAEL MOORE, DIRECTOR,
FLORIDA DEPARTMENT OF
CORRECTIONS and THE
ATTORNEY GENERAL, STATE
OF FLORIDA,
Respondents.
_____/

PETITIONER'S REPLY TO RESPONDENT'S ANSWER TO PETITION FOR A WRIT OF HABEAS CORPUS

Petitioner, Raymond Chapin, by and through the undersigned attorney, submit the following Reply to Respondent's Answer to Petition for Writ of

Appendix A

Habeas Corpus filed by Respondents on January 18, 2000.

1. Timeliness of Petition

Respondents argue the petition is untimely. Respondents also argue there is no federal or constitutional right to federal post-conviction review under 28 U.S.C. §2254; Respondents then argue that Rule 3.850 Fla. R. Crim. P. and 28 U.S.C. §2254 are two totally independent forms of action, not two interdependent forms of action.

Petition agrees there is no constitutional right to 28 U.S.C. §2254 relief. Such relief is a product of legislative action by Congress. For this reason, Petitioner, in the petition previously filed, discussed the Congressional intent behind the AEDPA.

Respondents have not addressed Petitioner's argument that the one year grace period to file a 28 U.S.C. §2254 after the April 1996 enactment of the AEDPA applied only to cases ripe (state remedies exhausted) for federal habeas review at the time of the passage of the AEDPA. Otherwise, the AEDPA changed the rules of procedure "midstream" and Congress did not intend such a change. Respondents have not addressed the cases cited by Petitioner which hold that the one year period does not begin to run until a year after the exhaustion of state remedies. See Valentine v. Senkowski, 966 F. Supp. 239 (S.D.N.Y. 1997); Powell v. Williams, 981 F. Supp. 1409 (D.N.M. 1997); Morgan v. Gilmore, 26 F. Supp. 2d 1035 (N.D.ILL. 1998).

Appendix A

Respondents argue Rule 3.850 and 28 U.S.C. §2254 are totally independent legal actions. This argument is not correct because Congress has made 28 U.S.C. §2254 dependent upon state procedural practice - a 28 U.S.C. §2254 petitioner must exhaust all state remedies as a necessary predicate for federal habeas relief. If Respondents are correct, then there is a conflict between the two year period allowed for by Florida law to exhaust state remedies and the one year period under 28 U.S.C. §2254. The question in this case is whether 1) Congress intended the AEDPA to apply to cases like this cause - final on direct appeal at the time of the enactment of the AEDPA but still timely within the state system of post-conviction remedies. Respondents have not

addressed these arguments. Petitioner reiterates and adopts by reference the arguments made on this issue in the Petitioner.

2. Equitable tolling.

Respondents argue that Petitioner contends he had a right to toll the federal time limitations while he obtained transcripts. Petitioner does not claim a right to equitable tolling. There is no right to equitable tolling. Petitioner merely argues that this Court should apply the equitable tolling doctrine pursuant to the cases cited in the petition. Respondents have not addressed any of these cases. See cases cited on page 10 of the petition.

Respondents argue that the delay due to Petitioner's attempt to get records should not count

towards any equitable tolling of the applicable time periods. Respondents assert, without any accompanying proof, that Petitioner's appellate public Defender could have provided the documents requested by Petitioner. Petitioner did not ask for the appellate records but for records possessed by his trial attorney. Petitioner refers to Appendix I attached to the petition, Order on the Motion for Contempt and Granting of Peremptory Writ of Mandamus. A review of this order will demonstrate Petitioner could not have received the documents through his appellate attorney.

Petitioner asks this court to consider the delay in this case due to the attempt to get the records; this Court should also consider, under the equitable

tolling doctrine, 1) Petitioner's direct appeal became final before the passage of the AEDPA 2) Petitioner relied upon the provisions of Rule 3.850, Fla. R. Crim. P. to exhaust his state remedies 3) the decision from the Eleventh Circuit governing whether the AEDPA would apply to cases final on direct appeal before the passage of the AEDPA did not occur until after Petitioner filed his state 3.850 motion. See Goodman v. United States, 151 F.3d 1335 (11th Cir. 1998). The combination of the 4 factors described above should lead this court to apply the equitable tolling doctrine. Under the totality of the circumstances of this case, a rigid application of the 1 year rule will lead to harsh and unfair results. See Miller v. New Jersey Department of Corrections, 145 F.3d 616 (3rd Cir.

1998).

3. Merits.

As to ground one, Respondents argue that the state court trier of fact found, as a mater of credibility, that there was no error by trial counsel. In the petition, Petitioner acknowledged that the state court had decided against him as a matter of fact - Petitioner also acknowledged that the state court factual findings are presumed correct unless the state court unreasonably determined the facts. Petitioner reiterates his argument in the Petition, pages 12-14, that the record below did not contain substantial, competent evidence to support the state factual finding - e.g. the state court found trial counsel had a well-reasoned trial strategy for his

actions. Yet, there was no evidence whatsoever to establish such a strategy. Counsel could not recall any of the conversations about the matter in question. Consequently, the state court unreasonably determined the facts.

As to ground two, Respondents claim Petitioner has not specifically identified his claims - failure to object to inflammatory comments. Petitioner specifically cited and incorporated by reference - the arguments contained on pages 26-27 of Appendix III to the petition. Petitioner also cited specific case law on the issues. Consequently, Petitioner does not understand Respondent's argument about a "lazy reference" to the transcripts. On issues III and IV, Respondents argue Petitioner

deficiently pled this ground. Respondents also argue these claims are speculative. Petitioner reiterates and incorporates by reference the arguments and case citations in the petition, pages 14-16. Petitioner alleged he did not get a hearing on issues III and IV. Consequently, the presumption of correctness should not apply. Based upon the allegations made in the state courts, Petitioner should receive a hearing on these issues.

CONCLUSION

This court should determine the petition is timely filed. If the court decides to review the merits of the petition, this court should either grant for a

new trial or set this cause for an evidentiary hearing.

Respectfully submitted,

/s/ James T. Miller
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing has been furnished by U.S. Mail on this 31st Day of January 2000 to: Mark C. Menser, Assistant Attorney General, Office of the Attorney General, The Capitol, Tallahassee, Florida 32399-1050.

/s/ James T. Miller
Attorney

Appendix A

No. _____

IN THE
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RAYMOND CHAPIN,
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MICHAEL MOORE, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS, AND ATTORNEY GENERAL, STATE OF FLORIDA,
Respondents.

Appendix B

Order of Dismissal With Prejudice

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
JACKSONVILLE DIVISION

RAYMOND CHAPIN,
Petitioner,
vs.
CASE NO.:3:99-CV-1116-J-21TEM

MICHAEL MOORE, etc.; et al.,
Respondents.

ORDER OF DISMISSAL WITH PREJUDICE

Petitioner initiated this action by filing a Petition for a Writ of Habeas Corpus pursuant to 28 U.S.C. §2254 on November 10, 1999, in which he challenges a 1994 judgment of conviction. On April 24, 1996, the President signed into law the Antiterrorism and Effective Death Penalty Act of 1996 (hereinafter AEDPA). This law amended 28

U.S.C. §2244 by adding the following new subsection:

(d)(1) A 1-year period of limitation shall apply to an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court. The limitation period shall run from the latest of–

(A) the date on which the judgment became final by the conclusion of direct review or the expiration of the time for seeking such review;

(B) the date on which the impediment to filing an application created by State action in violation of the Constitution or laws of the United States is removed, if the applicant was prevented from filing by such State action;

(C) the date on which the constitutional right asserted was initially recognized by the Supreme Court, if the right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review; or

(D) the date on which the factual

> predicate of the claim or claims presented could have been discovered through the exercise of due diligence.
>
> (2) The time during which a properly filed application for State post-conviction or other collateral review with respect to the pertinent judgment or claim is pending shall not be counted toward any period of limitation under this subsection.

28 U.S.C. §2244(d). Respondents contend, and this Court agrees, that Petitioner has not complied with the one-year period of limitation as set forth in this new subsection. See Respondents' Answer to Petition for Writ of Habeas Corpus (Doc. #6), filed January 20, 2000.

For prisoners, such as Petitioner Chapin, whose convictions became final before the effective date of AEDPA (April 24, 1996), the one-year period to file a federal habeas corpus petition extends from

the statute's effective date until April 23, 1997. Delancy v. Florida Dept. of Corrections, 246 F. 3d 1328, 1330 (11th Cir. 2001) (per curiam) (citing Wilcox v. Florida Dept. of Corrections, 158 F. 3d 1209, 1210 (11th Cir. 1998), cert. denied, 121 S. Ct. 103 (2000)).

The one-year limitation period in Petitioner's case began to run on April 24, 1996, the effective date of AEDPA. Thus, Petitioner should have filed this action on or before April 23, 1997, unless any periods of time can be excluded from this period because Petitioner was pursuing a properly filed application for state post-conviction relief.

Here, Petitioner first filed a motion for post-conviction relief in state court on January 22, 1998, see Respondents' Exhibits D and E, which was long

after the federal one-year limitation period expired on April 23, 1997. "Under §2244(d)(2), even "properly filed" state-court petitions must be "pending"in order to toll the limitations period. A state-court petition like [Petitioner]'s that is filed following the expiration of the limitations period cannot toll that period because there is no period remaining to be tolled." Webster v. Moore, 199 F. 3d 1256, 1259 (11th Cir.) (per curiam), cert. denied, 121 S. Ct. 481 (2000). Thus, the court will dismiss this case with prejudice as **untimely** since Petitioner has not shown an adequate reason why the dictates of the one-year limitation period should not be imposed upon him. This Court concludes that Petitioner's equitable tolling argument is unconvincing.

Appendix B

Therefore, it is now

ADJUDGED:

1. The Petition is **DISMISSED** with prejudice.

2. The Clerk of the Court shall enter judgment dismissing the Petition with prejudice, and dismissing this case with prejudice.

3. The Clerk of the Court shall close this case.

DONE AND ORDERED at Jacksonville, Florida, this 8th day of June, 2001.

/s/ Ralph W. Nimmons, Jr.
UNITED STATES DISTRICT JUDGE

Filed - 01 June - 8 PM 4:06
Clerk, U.S. District Court
Middle District of Florida
Jacksonville, Florida

Appendix B

No. _____

IN THE
SUPREME COURT OF THE UNITED STATES

RAYMOND CHAPIN,
Petitioner,

vs.

MICHAEL MOORE, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS, AND ATTORNEY GENERAL, STATE OF FLORIDA,
Respondents.

Appendix C

Order

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
JACKSONVILLE DIVISION

RAYMOND CHAPIN,
Petitioner,
vs.

CASE NO.:3:99-CV-1116-J-21TEM

MICHAEL MOORE, etc.; et al.,
Respondents.

ORDER

This cause is before the Court on Petitioner's Notice of Appeal (Doc. #14). On April 24, 1996, the President signed into law amendments to 28 U.S.C. §§ 2244, 2253, 2254, 2255, Appellate Rule 22, and 21 U.S.C. § 848(q). As a result, this Court should grant an application for a certificate of appealability only if the Petitioner makes a substantial showing of the

denial of a constitutional right. To make this substantial showing, Petitioner "must demonstrate that the issues are debatable among jurists of reason" or "that a court could resolve the issues [differently]." Barefoot v. Estelle, 463 U.S. 880, 893 n.4 (1983) (citation omitted). In addition, Petitioner could show "the questions are adequate to deserve encouragement to proceed further." Id.

Specifically, where a district court has rejected a prisoner's constitutional claim on the merits, the petitioner must demonstrate that reasonable jurists would find the district court's assessment of the constitutional claims debatable or wrong. See Slack v. McDaniel, 529 U.S. 473, 484 (2000); Hernandez v. Johnson, 213 F.3d 243, 248 (5th Cir.), cert. denied, 121

S. Ct. 400 (2000). When the district court has rejected a claim on procedural grounds, the petitioner must who that jurists of reason would find it debatable whether the petition states a valid claim of the denial of a constitutional right and that jurists of reason would find it debatable whether the district court was correct in its procedural ruling. Slack, 529 U.S. at 484; Franklin v. Hightower, 215 F.3d 1196, 1199 (11th Cir. 2000) (per curiam), cert. denied, 121 S. Ct. 1738 (2001).

In this action, the Court denied the Petitioner on procedural grounds. Petitioner has failed to show, at least, that jurists of reason would find it debatable whether the Petition states a valid claim of the denial of a constitutional right and that jurists of

reason would find it debatable whether the Court was correct in its procedural ruling(s). The requirement of a certificate of appealability was meant to prevent this type of Petitioner from proceeding any further.

Therefore, it is now

ORDERED:

Petitioner's Notice of Appeal (Doc. #14) is **DENIED.**

DONE AND ORDERED at Jacksonville, Florida, this 22nd day of June, 2001.

/s/ Ralph W. Nimmons, Jr.
UNITED STATES DISTRICT JUDGE

Filed - 01 June 22 PM 12:47
Clerk, U.S. District Court
Middle District of Florida
Jacksonville, Florida

Appendix C

No. _____

IN THE
SUPREME COURT OF THE UNITED STATES

RAYMOND CHAPIN,
Petitioner,
vs.

MICHAEL MOORE, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS, AND ATTORNEY GENERAL, STATE OF FLORIDA,
Respondents.

Appendix D

Petitioner's Request for a Certificate of Appealability

IN THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

RAYMOND CHAPIN,
Appellant/Petitioner,

vs. APPEAL NO.: 01-13402-H

MICHAEL MOORE, DIRECTOR, FLORIDA DEPARTMENT OF CORRECTIONS and THE ATTORNEY GENERAL, STATE OF FLORIDA,
Appellee/Respondents.
_____/

PETITIONER'S REQUEST FOR A CERTIFICATE OF APPEALABILITY

Comes now, Appellant/Petitioner, Raymond Chapin, through the undersigned attorney, and pursuant to the District Court Order of June 8, 2001, Denying Petitioner's 28 U.S.C. §2254 Petitioner for Writ of Habeas Corpus and the subsequent denial of a Certificate of Appealability by the United States

District Court. The Petitioner files this Certificate of Appealability pursuant to 28 U.S.C. §2253, and Appellate Rule 22(b), hereby requesting a Certificate of Appealability for the following reasons:

STATUS

The Petitioner filed a Petitioner for a Writ of Habeas Corpus pursuant to 28 U.S.C. §2254 on November 10, 1999. The Respondent was ordered to show cause as to why relief should not be granted. The Respondent's answer addressed only the untimeliness of the Petitioner's petition, not addressing the underlying issues for relief. The Petitioner's Counsel, James T. Miller, filed a Reply stating that the petition should be heard on the merits of said clams because under AEDPA, the

Petition was timely filed.

REVIEW ON APPEALABILITY

The Petitioner submits that in order to warrant a certificate of appealability, a petitioner must demonstrate that the issues are debatable among jurists of reason or that a court could have resolved the issues differently. Accord Barefoot v. Estelle, 463 U.S. 880, 893, n.4 (1983). In addition, a petitioner must show that the questions are adequate to deserve encouragement to proceed further.

ARGUMENT ON IMPROPER PROCEDURAL BAR/EQUITABLE TOLLING

The Petitioner's claim is that his attorney, James T. Miller, misapprehended the limitations period of AEDPA. Mr. Miller advised Petitioner that he did not know how the Eleventh Circuit would

interpret AEDPA until Webster v. Moore, 199 F. 3d 1256 (11th Cir. 2000), which was much later. Mr. Miller was hired to take his case as far as necessary to gain relief, State and Federal. Upon Petitioner retaining Attorney James T. Miller, Petitioner exchanged numerous letters with Mr. Miller, where Mr. Miller incorrectly informed/misadvised Petitioner concerning the time limitations of AEDPA. According to Helton v. Singletary, 85 F. Supp.2d 1323 (S.D. Fla. 1999) at [1], *"Fact that criminal defendant's trial counsel incorrectly informed him as to when one year limitations period for federal habeas petition under the Antiterrorism and Effective Death Penalty Act (AEDPA) began to run constituted "extraordinary circumstances" warranting equitable tolling of such period."*

Mr. Miller took the Petitioner's case, agreeing

to pursue state and federal remedies. Mr. Miller was involved in discussions with Petitioner's family during the pendency of the direct appeal about his possible services. Mr. Miller was hired in March of 1997, still within the AEDPA limitations, but failed to file a Petition for Writ of Habeas Corpus (on direct appeal claims) along with a Motion to Stay the Federal Proceedings until full exhaustion. This was due to Mr. Miller's misunderstanding of how AEDPA would be applied.

Had the undersigned known how AEDPA would be applied, Mr. Miller would have taken the appropriate steps to insure that Petitioner's federal rights were preserved. The Undersigned could have requested a stay of the proceedings in federal court

by raising the claims on direct appeal and asking for a stay until exhaustion of the 3.850 remedies. Since Counsel now makes the statement that he was hired at the end of March 1997, and that the Petition had to be filed by April 26, 1997, should allow this Petitioner to proceed under equitable tolling, where the fault did not lie with Petitioner.

The Petitioner submits that out of an abundance of caution, and the right to preserve his federal appeal rights, counsel could have followed the procedure announced in Bingham v. Anderson, 21 F. Supp. 2d 639 (S.D. Miss. 1998), where the court held: "the federal proceedings can be stayed until the state court has ruled on the motion for post conviction relief."

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Therefore, according to Counsel Miller's incorrect information/advice on AEDPA's time limitation period and Counsel Miller's subsequent abandonment of Petitioner at a critical stage in the proceedings and due to the fact that all of Petitioner's state applications were deemed properly filed, as argued in Miller's reply to the States response, and/or because Petitioner is innocent from the crime of conviction, this should create an exception which would equitably toll 28 U.S.C. §2244(d), as explained in Coleman v. Johnson, 184 F.3d 398 (5th Cir. 1999) at 402, *"The one year limitation does not operate as a jurisdictional bar and can, in appropriate exceptional circumstances, be equitably tolled."* Additionally see Helton v. Singletary, supra at [1], *"...defendant filed his*

petition within the time he reasonably believed he was allowed pursuant to counsel's advice." Also see U.S. v. Patterson, 211 F.3d 927 (5th Cir. 2000) at 931, *"[W]e must be cautious not to apply the statute of limitations too harshly. We are mindful that dismissing a first §2255 or habeas petition is a particularly serious matter."* Also at 931 supra, *"Although not in the context of the AEDPA limitations provisions, the Supreme Court, by way of example, has indicated that if a court has led the plaintiff to believe that she had done everything required of her, the doctrine of equitable tolling may be applied."* Which this is equally analogous to Attorney Miller's incorrect information/advice on the AEDPA's time limitation. See Forman v. Smith, 633 F.2d 634, 641 (2nd Cir. 1980), cert. denied 450 U.S. 1001 (1981), where the court held that, *"intentionally or, perhaps, inadvertently,*

misleading statements by a state officer that obscures the opportunity to develop a federal constitutional violation would be "cause" for not pursuing such a claim as required under state law." Also see Tippett v. Lockhart, 903 F.2d 552, 555 (8th Cir. 1990); Francis v. Rison, 894 F.2d 353, 354-355 (9th Cir. 1990); and Murray v. Carrier, 106 S. Ct. 2639 (1986). Petitioner submits that he has shown an extraordinary situation which would equitably toll the time limitation period of AEDPA. Therefore, some consideration is due to afford Petitioner a doorway with which to reach the merits of his claims.

Petitioner's claim is that he was misadvised by his Attorney, James T. Miller, as to the time limitation period of AEDPA. According to Helton v.

Singletary, 85 F. Supp. 2d 1323 (S.D. Fla. 1999) at [1] *"Fact that criminal defendant's trial counsel incorrectly informed him as to when one year limitations period for federal habeas petition under the Antiterrorism and Effective Death Penalty Act (AEDPA) began to run constituted "extraordinary circumstances" warranting equitable tolling of such period."*

It should be noted that numerous attorneys have made this same mistake, as the AEDPA limitations period has been interpreted in various ways by different Circuit Court's. Petitioner submits that he has shown an extraordinary circumstances which would equitably toll the time limitation period of AEDPA. Therefore, some consideration is due to afford Petitioner a doorway with which to reach the merits of his claims.

Appendix D

MERITS OF THE UNDERLYING CLAIMS

1.) Trial counsel improperly advised the Petitioner about possible impeachment (by use of conviction of prior crimes) if Petitioner testified.

Although the Petitioner did have a misdemeanor conviction, he did not know that the nature of this conviction would have been inadmissible as impeachment evidence. Petitioner relied upon his attorney's advice that if he testified, the jury would learn that Defendant had a prior conviction for marijuana use. Defendant did not know that the nature of his prior conviction (unless the defendant somehow opened the door to such evidence) was not admissible. McCrae v. State, 395 So.2d 1145, 1151 (Fla. 1980), cert. denied 454 U.S.

1041, 102 S. Ct. 583, 70 L. Ed. 2d 486 (1981).

A misdemeanor conviction for marijuana is not admissible as an impeachable conviction. Fotopoulos v. State, 608 So.2d 784 (Fla. 1991). Also Blackburn v. Foltz, 828 F.2d 1177 (6th Cir. 1987), holding that counsels erroneous advice to the defendant not to testify because of prior record constituted ineffective assistance of counsel in violation of the Sixth and Fourteenth Amendments of the United States Constitution.

The Petitioner has made a showing of the denial of a federal constitutional right, which should have required a new trial.

2.) Trial counsel failed to call an expert witness to rebut the medical testimony offered by

the State.

The State's medical testimony was critical proof in this case. There were no witnesses who testified they observed how the victim received her injury. The State's medical expert testified that the injury occurred by deliberate and violent smashing of the victim's head against the ground.

The Petitioner's trial counsel received a report from a defense witness which could have possibly established doubt about whether the injury was from an accidental fall or deliberate act. Yet counsel failed to call an expert witness in behalf of the Petitioner, who claimed he was not even in the back yard when the child apparently fell backwards several feet from a deck on to a concrete slab. Accord Miller v.

Wainwright, 798 F.2d 426 (11th Cir. 1986), holding that the failure of trial counsel to obtain a pathology expert to rebut the State's expert testimony constituted ineffective assistance of counsel. Also Rogers v. Israel, 746 F.2d 1288 (7th Cir. 1984). Had counsel investigated and/or hired expert's opinions, where opinion could have resulted in a different degree of verdict constituted ineffective assistance.

3.) Defense counsel rendered ineffective assistance of counsel by not objecting to improper arguments by the prosecutor.

During trial, counsel failed to object to improper arguments by the prosecutor that the injury to the victim was the worst skull fracture she had ever seen in a child abuse case. This argument was

improper because it was inflammatory (the worst skull fracture I have ever seen) and improperly offered the opinion that Petitioner's actions were child abuse. See Vaczek v. State, 477 So.2d 1034 (Fla. 5th DCA 1985), holding these type of comments were inflammatory and created undue sympathy for the victim.

The comment about the fact that Petitioner committed child abuse was improper because the expert testified on the ultimate issue of guilt-an opinion which applies a legal standard to a set of facts. The expert did not testify it was the worst skull fracture she had ever seen involving a child-the expert said it was the worst she had seen in a child abuse case. In Christian v. State, 693 So.2d 990 (Fla.

1st DCA 1996), the Court decided it was improper to permit an expert to express an opinion which applies a legal standard to a set of facts. Accord Gamble v. State, 644 So.2d 1376 (Fla. App. 5 Dist. 1994), applying clearly established federal case law for a determination of this claim.

Trial counsel also failed to object to comments that the State's evidence was unrebutted and unrefuted. This statement was a comment on the Defendant's failure to present a defense. It is improper to comment upon the failure of the Defendant to present a defense. See Samosky v. State, 448 So.2d 509 (Fla. 3d DCA 1983), also Chapman v. California, 386 U.S. 18, 24, 87 S. Ct. 824, 828, 17 L. Ed 2d 705 (1967).

4.) Newly discovered evidence/assistance of counsel.

An affidavit of Currelly obviously supplies information, had it been available, which should have been used at trial. To the extent that such evidence could have been discovered through before trial, defense counsel was ineffective for not investigating the witnesses against the Petitioner. The failure to investigate witnesses who could impeach State witnesses may be ineffective assistance of counsel. See Hatten v. State, 698 So.2d 899 (Fla. 5th DCA 1997); Whitfield v. State, 549 So.2d 779 (Fla. 4th DCA 1989); Williams v. State, 447 So.2d 442 (Fla. 5th DCA 1984).

Whitfield's testimony against the Defendant

was crucial evidence for the State. Whitfield essentially testified that Petitioner admitted he deliberately injured the victim. The evidence contained in Currelly's affidavit could have impeached Whitfield's testimony.

5.) Defense counsel rendered ineffective assistance of counsel by not investigating or calling as witnesses two of the Petitioner's neighbors who could have corroborated Defendant's exculpatory statements to the police.

The failure to call defense witnesses who can corroborate or establish a defense may be ineffective assistance of counsel. See Roush v. State, 468 So.2d 1103 (Fla. 1st DCA 1985); also U.S. v. Gray, 878 F.2d 702 (3rd Cir. 1989); Jamison v. Foltz, 672 F. Supp. 1002

(E.D. Mich. 1987).

The Petitioner advised trial counsel that his two neighbors could corroborate the fact that he was in his front yard doing yard work while the victim and her sister were in the back yard. Petitioner told the police that when he returned to the backyard he discovered that the victim had fallen and hit her head on a walking stone. Petitioner advised his counsel that he should talk to these witnesses so that they could testify. Counsel did not interview these witnesses. The failure to call these witnesses prejudiced the Petitioner because there was no testimony to corroborate Petitioner's statements that the victim must have accidently injured herself while she was unattended in the back yard. An affidavit

was obtained from a neighbor who was talking to the Petitioner within seconds of this incident occurring.

WHEREFORE, the Petitioner prays this Court will grant a certificate of appealability in the interest of justice.

Respectfully submitted,

/s/ James T. Miller
James T. Miller
Florida Bar No.: 0293679
233 E Bay St., Ste. 920
Jacksonville, FL 32202
904/791-8824 Telephone
904/634-1507 Facsimile

CERTIFICATE OF SERVICE

I hereby certify that a true copy of the foregoing has been furnished by U.S. Mail this 5th day of July 2001: Mark C. Menser, Assistant Attorney

General, Office of the Attorney General, The Capitol, Tallahassee, Florida 32399-1050.

/s/ James T. Miller
James T. Miller

Appendix D

No. _____

IN THE
SUPREME COURT OF THE UNITED STATES

RAYMOND CHAPIN,
Petitioner,
vs.

MICHAEL MOORE, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS, AND ATTORNEY GENERAL, STATE OF FLORIDA,
Respondents.

Appendix E

Order

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

NO. 01-13402-H

RAYMOND CHAPIN,
Petitioner-Appellant,
versus

MICHAEL MOORE, Director
Florida Department of Corrections,
ROBERT A. BUTTERWORTH, Attorney
General, State of Florida.
Respondents-Appellees.

Appeal from the United States District Court
for the Middle District of Florida

ORDER:

To merit a certificate of appealability, appellant must show that reasonable jurists would find debatable both (1) the merits of an underlying claim

and (2) the procedural issues he seeks to raise. See 28 U.S.C. §2253(c)(2): Slack v. McDaniel, 529 U.S. 473, 478, 120 S. Ct. 1595, 1600-01, 146 L. Ed 2d 542 (2000). Because his petition is plainly barred by the one-year statute of limitations set forth in 28 U.S.C. §2244(d)(1), appellant has failed to satisfy the second prong of the Slack test. Accordingly, appellant's motion for a certificate of appealability is DENIED.

/s/ Stanley F. Birch
UNITED STATES CIRCUIT JUDGE

Filed
U.S. Court of Appeals
Eleventh Circuit
Sep 18 2001
Thomas K. Kahn
Clerk

Appendix E